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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re DAMIEN P., et al., Persons Coming Under the Juvenile Court Law.	H022744 (Santa Cruz County Super.Ct.Nos. DP000145 & DP000146)
SANTA CRUZ COUNTY HUMAN RESOURCES AGENCY, Plaintiff and Respondent, v. JESSICA R., Defendant and Appellant.	

Jessica R. appeals from an order terminating her parental rights to her children Damien P. and Zoe R. and selecting adoption as the permanent plan. (Welf. & Inst. Code, §§ 395, 366.26.)[1] She contends that her parental rights were wrongfully terminated because she had visited the children consistently and they would benefit from continuing the relationship. We disagree and affirm.

[1] All further statutory references are to the Welfare and Institutions Code.

BACKGROUND[2]

In October 1999, the juvenile court sustained petitions filed pursuant to section 300, subdivision (b)[failure to protect] as to the children Zoe R. (born June 1998) and Damien P. (born July 1999). The petitions alleged that the children were placed into protective custody on September 17, 1999, after mother Jessica R. failed to initiate medical care for Damien who was hospitalized with pneumonia and anemia and suffered from failure to thrive. Several prior referrals had been received by the Human Resources Agency of Santa Cruz County (the Agency) alleging general and medical neglect of Zoe, including a report from the father Robert P., that mother was unable to adequately parent Zoe. The parents had been chronically homeless for the last 10 months and the shelter where they were staying refused to allow father to return there. The jurisdictional/dispositional report observed that the parents had a multitude of problems: poor parenting skills during supervised visits, immaturity, poor life planning skills and chronic homelessness. The report also noted that mother had not faced the fact that father was not a couple with her, and that Damien had special medical needs because he had difficulty feeding and was diagnosed with failure to thrive. Disposition was continued until a psychological evaluation was completed on mother.

The psychological evaluation showed that mother's apparent neglectful and abusive childhood background had led to significant emotional immaturity and related psychological problems of dependency, dysphoria, impulsivity, hostility, and poor judgment. She had very low self-esteem and self-confidence with limited abilities to live independently and successfully. The evaluating psychologist believed that mother's difficult childhood background and the resultant personality traits and characteristics were

[2] The facts up until the setting of the permanency planning hearing are summarized from our prior opinion concerning the writ petition filed pursuant to section 366.26, subd. (*l*) and California Rules of Court, rule 39.1B: *Jessica R. v. Superior Court* (Jan. 3, 2001, H022082) (nonpub. opn.).

predictive of risks of future child neglect and abuse, and that any reunification plan would require a high degree of supervision, a slow graduated process of having her be responsible for the care and supervision of the children, significant parenting education services, long-term counseling and close Agency monitoring.

After a contested dispositional hearing in February 2000, the juvenile court found the children dependents of the court and ordered out-of-home placement with reunification services for mother including parenting education, counseling, and requiring maintenance of a stable lifestyle with suitable housing. Mother was directed to attend specific educational programs and personal counseling at the Parents Center and then demonstrate her skills. The social worker was directed to provide support, consultation, referrals, coordination, and feedback. Visitation continued at three times per week.

Also in February mother began to have overnight visits with Zoe. She then started working part-time at the Santa Cruz Boardwalk although she still lived in a homeless shelter. Father had apparently married the children's godmother. In March 2000, the court ordered that father was not to have unsupervised visits with the children and that mother was not to have the children in an unsupervised situation with father.

On April 17, 2000, the Agency filed a section 388 petition seeking to modify the visitation by suspending overnight visits with mother and by having supervised visits at the social worker's discretion because mother had violated the court's orders regarding the father. On May 8, the parties stipulated that mother was to have supervised visitation and that third parties were not to be present during visits. The court ordered mother to stay away from father and issued a restraining order requiring father to stay away from mother.

In a report prepared in July 2000, the social worker noted that mother was residing with her grandmother who was a heavy smoker even though the children's physician recommended that they reside in a smoke-free environment. Mother had missed numerous appointments with agencies to help her find housing and had not been attending counseling.

In a report prepared August 2, 2000, the social worker noted mother's lack of cooperation in her attempts to arrange a home visit. The social worker arranged a visit directly with the grandmother and found a frail elderly person who required many in-home services and who would be incapable of protecting the children or overseeing visitation. In addition, mother was allowing father into the grandmother's home without her permission and the housing itself had restrictions against children living there.

The report for the six-month review recommended termination of reunification services and the setting of a permanency planning hearing. The social worker reported that even though mother's visits were regular, she required prompting to change the children's diapers and to feed them. Although mother participated in a parenting group she had a limited ability to grasp abstract parenting concepts and had difficulty interpreting Damien's cues and attending to his needs. Mother failed to attend counseling from February 2000 to July 2000 although the social worker informed her of its importance.

The six-month review was held in early October 2000. The social worker testified to much the same information as presented in her report. Mother testified that she regularly visited her children, that the visits went well, and that she did know when to feed and change her children. She explained that her work schedule interfered with counseling appointments and her search for housing. She anticipated getting a second job, saving money and finding a place to live within the next few months. Three witnesses for mother testified to her participation in a parent's group and to her dedication to getting her children back.

At the conclusion of the hearing, the juvenile court noted mother's love for her children and her dedication to getting them back. But the court found that she had shown minimal compliance with the service plan and had made minimal progress in alleviating the causes of the dependency. The court found by clear and convincing evidence that reasonable services had been provided and that there was no substantial probability that the children could be safely returned to her custody within six months. The court terminated

reunification services and set a permanency planning hearing for January 2001. Visitation was reduced to once a week.

On November 7, 2000, the Agency filed a section 388 petition to reduce visitation to one visit per month on the grounds that (1) mother had been arrested for conspiracy and grand theft for staging a robbery of her employer and it would be detrimental for the children to visit her in jail if she were incarcerated, and (2) it would be in the children's best interests to begin decreasing contact with mother since a section 366.26 hearing was set for January and the Agency would be recommending adoption as a permanent plan. The court continued the hearing and directed counsel to brief the issue of a showing of detriment from reduced visitation. Mother had been released from custody, so the court struck the issue of incarceration.

On December 11, 2000, after a contested hearing on the petition, the court reduced mother's visits with each child to a minimum of once every other week for one hour.

The report prepared for the permanency planning hearing recommended termination of both parents' parental rights and a permanent plan of adoption. The social worker reported that the children were thriving in the home of prospective adoptive parents where they had been for the past 13 months. The social worker described the relationship between the mother and the children as a "relationship of survivor to survivor." An addendum to the report dated January 31, 2001, noted that mother had pleaded guilty to felony grand theft and received a sentence of 45 days in jail and 3 years of probation. The social worker opined that this information was relevant in that it demonstrated mother's lack of judgment in planning a violent crime that resulted in injury to herself, jeopardizing her own safety as well as her job, and in risking a jail sentence and time away from her children.

A permanency planning hearing was held on February 5, 2001. The social worker's reports were received in evidence. Mother testified that she had regularly visited with her children (three to five hours a week with her daughter and close to eight hours a week with her infant son). Her daughter called her mommy and wanted to go home with her after the

visits. They had lived together for her daughter's first 15 months. Mother's counsel argued that the exception to adoption contained in section 366.26, subdivision (c)(l)(A), where a parent has maintained regular visitation and contact, applied.

In terminating mother's parental rights, the court stated that although mother had visited with the children, she had not had a parental role and thus did not fall within the statutory exception.

DISCUSSION

I

Restriction of Visitation

Mother first contends the juvenile court erred in terminating her parental rights after improperly restricting visitation because she was then sabotaged in her ability to establish an exception to the statutory preference for adoption found in section 366.26, subdivision (c)(1)(A). The Agency responds that mother failed to appeal from the order reducing visitation and thus has waived her right to appeal this issue. We agree.

At the six-month review hearing, the court terminated reunification services, set a permanency planning hearing and reduced visitation to once per week. The Agency then petitioned under section 388 to reduce visits to once per month. On December 12, 2000, after a hearing, the juvenile court ordered visitation reduced to one visit every other week. No appeal was taken from that order.

The order restricting visitation was final and appealable as of December 12, 2000. By not appealing from that order within the statutory time requirement of 60 days (Cal. Rules of Court, rule 1435(f)), mother has waived her right to challenge it now in this appeal from the later termination of her parental rights on February 5, 2001. (See *In re Melvin A.* (2000) 82 Cal.App.4th 1243 [order discontinuing visitation was a separate order from which appellant could have and should have appealed immediately after it was entered]; *In re Janee J.* (1999) 74 Cal.App.4th 198 [application of the waiver rule in the usual dependency case will not offend due process]; *In re Meranda P.* (1997) 56 Cal.App.4th 1143 [an

unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order].)

Mother further argues that the Agency sabotaged her relationship with her children by petitioning to have visits reduced and thus she could not come within the statutory exception for a parent who has maintained regular contact and visitation. Again, we note that mother has waived the basis of this claim of error by failing to appeal from the order. In fact, visitation was initially reduced to one visit per week at the six-month review hearing, when reunification services were terminated. The visitation order was not challenged in the writ petition filed pursuant to Rule of Court 39.1B. (See *Jessica R. v. Superior Court, supra,* nonpub. opn.)

The December order, in response to the Agency's section 388 petition to reduce visitation to once a month, reduced visitation to once every other week. This petition was filed due to the changed circumstances that mother had been arrested following her participation in a conspiracy to rob her employer and to prepare the children for the recommended plan of adoption. In ruling on the section 388 petition, we presume the trial court properly considered the evidence and followed the existing law. (*People v. Diaz* (1992) 3 Cal.4th 495, 567; Evid. Code, § 664.) Moreover, at this point in the proceedings, following the October 2000 termination of reunification services, the balance had shifted to what was best for the children in terms of finding them a stable permanent home. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609-610.) Here, the court order noted that the minors' best interests were served by the reduction in visitation in that reunification services had been terminated and return to the parents had not occurred.

Furthermore, no prejudice has been shown. As the Agency has pointed out, even if the juvenile court had not reduced visitation, mother would have had only four or five more visits with the children. Her lack of visitation was not the deciding factor in the court's decision.

II

Improper Construction of Section 366.26, subdivision (c)(1)(A)

Mother also complains that the juvenile court erred in terminating her parental rights based on an improper construction of section 366.26, subdivision (c)(1)(A). She insists that she demonstrated that she came within the statutory exception provided where termination would be detrimental to the child because the parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. (See § 366.26, subd. (c)(1)(A).) We find no merit to her claim.

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) As was recently noted by the court in *In re Derek W.* (1999) 73 Cal.App.4th 823, 826, "If the court finds that a child may not be returned to his or her parent and is likely to be adopted, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the child under one of four specified exceptions. [Citations.]" (See § 366.26, subd. (c)(1); see also *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1798-1799.) The parent clearly has the burden to show that the statutory exception applies (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164), and here mother has not met that burden.

Section 366.26, subdivision (c)(1)(A) provides an exception to the termination of parental rights if termination would be detrimental to the child because the parent has maintained regular visitation and contact and the child would benefit from continuing the relationship. The test for determining the applicability of this exception is whether the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

Mother takes exception to this "balancing test" and criticizes both *In re Autumn H.* and our case adopting the balancing test, *In re Beatrice M.* (1994) 29 CalApp.4th 1411. She insists that such a balancing test is contrary to the plain language of the statute and that

new terms cannot be added to a statute that is clear. Mother maintains that only a slight detriment to the child is required (as in loss of the parent relationship) and that it is not necessary that she occupy a "parental role" when that was impossible.

We have previously discussed this statutory exception in detail in *In re Beatrice M.*: "Although the kind of parent/child relationship which must exist in order to trigger the application of section 366.26, subdivision (c)(1)(A) is not defined in the statute, it must be sufficiently strong that the child would suffer detriment from its termination. In *In re Autumn H., [supra,]* 27 Cal.App.4th [at p. 576], the Fourth Appellate District defined the 'benefit' from continuing such a relationship as follows: 'In the context of the dependency scheme prescribed by the Legislature, we interpret the "benefit from continuing the [parent/child] relationship" exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*In re Autumn H., supra*, 27 Cal.App.4th [at p. 575].)" (*In re Beatrice M., supra*, 29 Cal.App.4th at p. 1418.)

Mother complains that these published cases have added to her burden when the Legislature did not specify such additional terms. We agree with the court in *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821, when it stated: "*Beatrice M.* and *Autumn H.* do not enlarge the parent's burden; they simply define it."

Moreover, as we further noted in *Beatrice M.*, when reunification has not been accomplished in the time period allowed by statute, the focus of the dependency proceeding shifts to selecting the best permanent plan for the child, which is adoption if possible and unless there are specified exceptional circumstances. "We do not agree that frequent and

loving contact with the [child] is sufficient to establish the 'benefit from a continuing relationship' contemplated by the statute." (*In re Beatrice M., supra*, 29 Cal.App.4th at p. 1418.) "Interaction between [a] natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) As pointed out by the court in *In re Derek W., supra*, 73 Cal.App.4th at p. 827 [citations omitted]: "The parent must do more than demonstrate 'frequent and loving contact[,]' [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a 'parental role' in the child's life."

More recently, we have explained: "Where a biological parent, such as appellant, is incapable of functioning in that [parental] role, the child should be given every opportunity to bond with an individual who will assume the role of a parent. . . . To hold otherwise would deprive children of the protection that the Legislature seeks to provide. (§§ 300, 366.25, subd. (a), 366.26, subd. (b).)" (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.) We see no reason to depart from this logical analysis.

In fact, in 1998, the Legislature "emphasized the exceptional nature of all the circumstances identified in section 366.26, subdivision (c)(1) by revising the statute . . . to require the court to find not only that one of the listed circumstances exists, but also that it provide 'a compelling reason for determining that termination would be detrimental to the child.' (Stats. 1998, ch. 1054, § 36.6[, p. 6365].) This amendment . . . makes it plain that a parent may not claim entitlement to the exception provided by subdivision (c)(1)(A) simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349.)

Mother also complains that her rights to due process have been violated because the statute as interpreted imposes an impossible burden on her. As the above noted cases have

discussed, the burden on the parent to show the exception to the statutory preference for adoption is not unfair nor impossible. Our Supreme Court has stated: "The dependency scheme, when viewed as a whole, provides the parent due process and fundamental fairness while also accommodating the child's right to stability and permanency." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307; see also *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242; *In re Casey D.* (1999) 70 Cal.App.4th 38.)

III

Sufficiency of the Evidence

In any event, mother claims that she has met the requirements for the statutory exception to adoption in that she maintained regular contact with the children and they would benefit from continuing the relationship. She points out that her daughter lived with her for the first 14 or 15 months of her life, that she calls her mommy and that her witnesses described a loving parental relationship.

However, our review of the record shows substantial evidence to support the juvenile court's finding that parental rights should be terminated.[3] (See *In re Heather B.* (1992) 9 Cal.App.4th 535, 563.) The trial court weighed the evidence and considered the statutory exception before determining that adoption was the best plan for the children. The evidence showed that mother demonstrated few parenting skills at the supervised visits, needing to be reminded to change the baby's diaper and to feed the children. The psychological evaluation concluded she had minimal ability to live independently, poor judgment and emotional immaturity. Her actions in committing a crime at a cost of physical injury to herself and possible incarceration showed lack of appreciation for the responsibilities of parenthood. No evidence of any detriment to the children from ending their visits with their

[3] Division Three of the First District has concluded that such a decision, determining appropriate custody for a child at the permanency planning stage, should be reviewed under the abuse of discretion standard. (See *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.)

mother was shown. Mother's failures to complete her service plan, to demonstrate appropriate parenting skills and to accomplish basic life tasks such as acquiring suitable housing weighed heavily against her.

DISPOSITION

The orders appealed from are affirmed.

Wunderlich, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

O'Farrell, J.*

* Judge of the Monterey Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.